FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 8 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 771

CHARLES WALDER, *et al.*,

Petitioners,

against

PARAMOUNT PUBLIX CORP., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLAUDIA PEARLMAN,
Attorney for Petitioners,
c/o EDGAR A. BUTTLE,
36 West 44th Street,
New York 36, New York.

Of Counsel:
EDGAR A. BUTTLE,
Tower Building, Suite 207,
Washington, D. C.

INDEX

	PAGE
Jurisdiction	1
Statute Involved	1
Questions Presented	3
Statement of the Case	3
Opinions Below	6
Reasons for Granting the Writ	10
Conclusion	13
Appendix:	
Amended Complaint	A1
Affidavit of Sidney Lefcourt	A35
Affidavit of Jules Pearlman	A37
Opinion of Judge Dimock	A40
Motion for Reargument	A43
Judgment of United States District Court	A43
Opinion of United States Court of Appeals	A45
Judgment of United States Court of Appeals	A50

Authorities Cited

CASES:

	PAGE
Eagle Lion Studios, Inc. v. Loew's Inc., 248 Fed. 2d 438, 451	3, 8
Fanchon & Marco, Inc. v. Paramount Pictures, 133 F. Supp. 839, 845 (S. D. N. Y. 1955)	1, 3, 8, A49
McDonald v. First Nat. Bank of Attleboro, 1 Cir., 70 F. 2nd 69	A42
Shubert v. Columbia Pictures Corp., 189 Misc. 734, 739, Sp. Term, McNally, J., aff'd 274 App. Div. 751	A42
Stogop Realty Co. v. Marie Antoinette Hotel Co., 217 App. Div. 555, 564-5	A42
U. S. v. Paramount Pictures, et al., 66 F. Supp. 323 (June 11, 1946)	1
U. S. v. Paramount Pictures, et al., 70 F. Supp. 53 (December 31, 1946)	1
U. S. v. Paramount Pictures, et al., 334 U. S. 131; 68 S. Ct. 915, 92 L. Ed. 1260 (May 31, 1948)	1, 5, 10, A47
U. S. v. Paramount Pictures, et al., 85 F. Supp. 881 (July 25, 1948)	1, 10

IN THE

Supreme Court of the United States

October Term, 1959

No.

CHARLES WALDER, *et al.*,

Petitioners,

against

PARAMOUNT PUBLIX CORP., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles Walder and Ethel L. Walder, as Trustees of the Tivoli Operating Corporation, a dissolved Florida corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 1, 1959, affirming a summary judgment against petitioners entered in the United States District Court for the Southern District of New York, in an anti-trust suit for treble damages, premised upon the Sherman Act and Clayton Act anti-trust violations established in the case of *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323 (June 11, 1946); *U. S.* v. *Paramount Pictures, et al.*, 70 F. Supp. 53 (December 31, 1946); *U. S.* v. *Paramount Pictures, et al.*, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (May 31, 1948); *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881 (July 25, 1948). The Court of Appeals in effect held that Tivoli Operating Corporation could not demonstrate injury within the purview of *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955) (A. 49).

The opinion in this decision conjectures the possibility that the injurious impact of an anti-trust conspiracy cannot extend to a suit for the benefit of a theater operating corporation which only came into existence after a forced 50-50 stock arrangement had been entered into between an independent operator or owner and a Paramount conspirator as a means of obtaining first run motion pictures for the newly formed corporation. The injury charged in the case at bar was in effect the conspiracy forced issuance of 50% of the substantial dividend paying capital stock of Tivoli Operating Corporation for inadequate consideration and conspiracy forced payment of unwarranted management fees to Paramount Enterprises a conspirator in order to obtain a better run of pictures than was theretofore permitted by the Paramount conspiracy, as alleged in paragraphs 81st through 85th and elsewhere in the complaint (A. 27-28).

Jurisdiction

The judgment of the Court of Appeals was made and entered on December 1, 1959 (A. 50). Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). Jurisdiction below was based upon Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Section 15.

Statute Involved

Clayton Act, Sec. 4 (38 Stat. 731; 15 U. S. C. Section 15). That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(As amended in 1956.)

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Questions Presented

1. Whether defendant conspirators whose acts are held to be violative of the antitrust laws are immunized from treble damage liability to a corporation which came into existence as a result of a conspiracy forced 50-50 prearranged stock distribution to a non-defendant co-conspirator and a competing independent theater owner seeking to avoid the consequences of the conspiracy [as conjectured in *Franchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955), the only case relied upon by the Court of Appeals (A. 49)].

2. Whether this case calls for the exercise of this court's supervisory jurisdiction in that the holding below reflects as Chief Judge Clark of the Court of Appeals, Second Circuit, noted in his dissenting opinion in the case of *Eagle Lion Studios, Inc.* v. *Loew's Inc.*, 248 Fed. 2d 438, at page 451, that there "seems to be a developing trend in some of our trial courts of hostility" toward antitrust cases.

Statement of the Case

The Facts

1. This is an action for treble damages for alleged violations of the antitrust law 15 U. S. C. Section 1 *et seq.* (A. 40).

2. Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and that because of this conspiracy the latter corporation was forced to distribute (under economic coercion) one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiff Trustees, on behalf of Tivoli Operating Corporation (dissolved), seek to recover from defendants the loss thus suffered by Operating (A. 40) and additionally the loss suffered in paying out unwarranted management fees to Paramount Enterprises as the result of the coercive effect of the conspiracy.

3. From the year 1928 to the present time the Walder family, through various corporations, has had exclusive ownership of the Tivoli Theatre, a neighborhood motion picture house in Miami, Florida. Save for the period between 1937 and 1947 operation of the theater also has been exclusively in the hands of the Walders. Until 1931 ownership and operation were both in the name of Tivoli Theatre, Inc. In 1931 ownership was transferred to Walwal Corporation. In 1937 Tivoli Operating Corporation was organized to replace Tivoli Theatre, Inc. in the operation of the theater. The total subscribed cash capital of Tivoli Operating consisted of $2,000: $1,000 paid in by Walwal in addition to its contribution of a lease for which it received rent, and $1,000 paid in by Paramount Enterprises, Inc.[1] Operating paid Walwal an annual rent of $9,600; Enterprises exerted its efforts in obtaining films for the Tivoli; and the net proceeds were divided between Walwal and

[1] During the period here involved Paramount Enterprises operated theaters in the Miami region and was a wholly owned subsidiary of defendant Paramount Pictures, Inc.

Enterprises in proportions which varied over the ten-year existence of the arrangement (A. 46). In addition, during this period, Paramount Enterprises received from Tivoli Operating management fees of $36,899.44 allegedly unwarranted (A. 28). In 1947 these arrangements were terminated, and operation of the theater passed to Tivoli Amusement Company, Inc., a corporation wholly owned by the Walder family. In 1951 the members of the Walder family, in their various capacities, filed a private antitrust action alleging that Enterprises was included in management of the Tivoli Theater, and in the profits therefrom, because of coercion exerted by defendants in preventing the Tivoli Theatre from receiving motion pictures for exhibition which the theater would have obtained had distribution been on a properly competitive basis. Thus plaintiffs alleged injury from practices condemned in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948) (A. 47). An amended complaint (A. 1) was filed on January 30, 1956 which sets forth at paragraphs 81st through 85th the injury and damages allegedly incurred by Tivoli Operating Corporation from 1937 to 1947 (A. 27-28) which is the subject of this petition and prior appeal.

4. In the complaint there were five plaintiffs or groups of plaintiffs—(1) the members of the Walder family individually; (2) the members of the Walder family as trustees for Tivoli Theatre, Inc., a dissolved corporation; (3) the Walwal Corporation; (4) Tivoli Amusement Company, Inc.; (5) two members of the Walder family as two of the surviving three trustees of Tivoli Operating Corporation, a dissolved corporation.[2] At various stages of the pretrial proceedings all the plaintiffs have been eliminated from the case except the plaintiffs in category (5); the trustees of Operating Corporation. As to them, on September 29, 1958 the district court, in an unreported opinion, granted defendants' motion for summary judgment. An appeal followed (A. 47).

---

[2] Operating was formally dissolved on Oct. 12, 1948.

History of the Litigation Otherwise

1. The original complaint was filed on September 4, 1951. In an opinion dated June 24, 1955 and reported at 132 F. Supp. 912 (S. D. N. Y. 1955), Judge Weinfeld granted defendants' motion for summary judgment to the extent of eliminating the Walders from the case, both as individuals and as trustees of Tivoli Theatre, Inc. Judge Weinfeld reasoned that the Walders individually had no standing since the only injuries alleged related to corporations of which the Walders were stockholders. Judge Weinfeld then held that under the controlling Florida law, the trustees of a dissolved corporation, fully as much as the dissolved corporation, were bound by the requirement that suits by a dissolved corporation be brought within three years after final dissolution (A. 48).

2. On December 17, 1956 Judge Leibell granted summary judgment dismissing Walwal from the case. He held that Walwal had received a fair rent from Operating (i.e., a conceded 15 per cent of gross receipts) in the ten-year period of Operating's existence. Walwal appealed from this decision, but on June 12, 1957 the appeal was dismissed for failure to prosecute (A. 48).

3. On June 5, 1958 Judge Dimock dismissed the complaint as to Tivoli Amusement. No appeal was taken (A. 48).

The Opinions Below

The case on appeal was argued before a court composed of Judges Lumbard, Waterman and Friendly (A. 50). The opinion without dissent was rendered by Judge Waterman (A. 45). This opinion displays a lack of understanding of the claim of Tivoli Operating Corporation. It states:

> "Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully" (A. 49).

An accurate statement of the plaintiffs' claim in part is found in Judge Dimock's opinion (A. 40) in granting summary judgment on other grounds. It is as follows:

> "Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., hereinafter Enterprises, a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and in the distribution of one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiffs, on behalf of Operating, seek to recover from defendants the loss thus suffered by Operating."

Tivoli Operating does not contend, as suggested by Judge Waterman's opinion, that it complains of injury from the very acts that created it. It contends that the clearances it obtained after its creation were conditioned upon the forced issuance of capital stock under an illegal and unenforceable prearrangement and the forced payment of management fees arranged for after its corporate creation without receiving adequate consideration therefor. In other words, Tivoli Operating is contending that because of the conspiracy it was forced to pay tribute in the nature of valuable stock and unwarranted management fees to obtain motion picture clearances it was legally entitled to in any event as established by the *Paramount* case, *supra*.

Furthermore, plaintiff trustees of Tivoli Operating have not argued as Judge Waterman asserts that Paramount Enterprises contributed $1,000 for management fees. It has argued the $1,000 was inadequate consideration for the stock and that the stock was distributed to Paramount Enterprises because of the coercive effect of the antitrust conspiracy upon Tivoli Operating Corporation. Likewise it is contended that unwarranted manage-

ment fees were paid by Tivoli Operating to Paramount Enterprises also because of the coercive effect of the conspiracy. In the latter connection it was pointed out to the Court of Appeals that since Paramount Enterprises had no more than a pre-arranged 50% interest in the newly formed corporation (i.e., Tivoli Operating) it could not have effectuated the payment of tribute heretofore described except through the coercive impact of the conspiracy. The foregoing is another indication that the Court of Appeals has not given careful consideration to the case incident to rendering its decision.

Another indication that arbitrary and capricious consideration is given to antitrust cases of this type, as suggested by Judge Clark in his dissenting opinion in the case of *Eagle Lion Studios, Inc.* v. *Loew's Inc., supra,* is the fact that the trial court (A. 40) and the Court of Appeals (A. 45) have completely ignored in their opinions any reference to or consideration of plaintiffs' claim for management fees set forth in paragraph 85th of the amended complaint (A. 28) or the affidavit of an expert (A. 35) as to the value of the stock distributed by Tivoli Operating to Paramount Enterprises. Triable issues are thereby raised which require more careful judicial consideration than demonstrated in the opinion of the Court below unless the defendants are immunized from liability to Tivoli Operating as the result of their circumventive device to avoid the consequences of the conspiracy as found in the *Paramount* case, *supra.* This point is raised because the Court of Appeals does not make it entirely clear on what premise they are actually affirming the trial court except as to their adherence to the opinion of Judge Dawson (referring to a different type of injury or damages) in *Fanchon & Marco, Inc.* v. *Paramount Pictures, supra,* at page 845, to the following effect:

> "Plaintiff may also be contending that Fanchon & Marco did not have an opportunity to open a first run theatre in Hollywood, except by allowing Paramount to own 50% of the stock of the theatre and

by agreeing to enter into the franchise agreement and service contract hereinbefore referred to. It must, however, always be kept in mind that this is not a suit for the benefit of Fanchon & Marco, but a suit for the benefit of Paramount Hollywood, which only came into existence after the fifty-fifty stock arrangement had been entered into and after an understanding had been reached that it was to operate as a first run Paramount Theatre.

However, even if the contention above mentioned could be advanced on behalf of Paramount Hollywood, it would still leave the question as to whether the plaintiff had established that the condition of which it complained was the result of a conspiracy or monopoly which violated the anti-trust laws.

The mere fact that Paramount was willing to enter into a franchise agreement for a first run theatre in Hollywood only upon condition that it owned 50% of the stock would not be a violation of the anti-trust laws unless plaintiff established that Paramount was a party to a conspiracy to monopolize or restrain commerce in the Los Angeles area by means of such agreements. Chief Judge Clark has well pointed out in Fifth and Walnut v. Loew's Inc., 2 Cir., 1949, 176 F. 2d 587, at page 590, certiorari denied 1949, 338 U. S. 894, 70 S. Ct. 242, 94 L. Ed. 549:

> "* * * The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Anti-trust Act; and no such decision has ever been made. * * *."

Reasons for Granting the Writ

The petition presents an important and novel question of law not previously determined, namely, whether the impact of a conspiracy, within the meaning of *U. S.* v. *Paramount, supra,* may extend to a corporate entity, created by a conspirator and an innocent independent motion picture theatre owner, as the result of an illegal conspiracy which had the coercive effect of wantonly and injuriously reducing its assets and income. In this respect, it is submitted that the decision of the Court below departs from the intent of the *Paramount* case.

The Supreme Court in *U. S. v. Paramount, et al., supra,* found the defendants guilty of a conspiracy to monopolize (1) by maintaining a nation-wide system of runs and clearance and (2) by agreeing individually with lessees to grant unreasonable clearance against theatres operated by their competitors. They were also found guilty of restraining trade by jointly operating or owning motion picture theatres with each other and with independents through operating agreements, profit-sharing leases, and stock interests. (See also *U. S.* v. *Paramount Pictures,* 85 Fed. Supp. 881, at pages 883, 884, 885). These conspiratorial acts imposed on Tivoli Operating (A. 27-28) had the coercive effect of forcing the payment of tribute for reasonable clearances. The tribute paid for reasonable clearances was a prearranged 50% distribution of capital stock to Paramount Enterprises a conspirator unenforceable except for the conspiracy and unwarranted management fees coercively arranged for by Paramount Enterprises after the creation of Tivoli Operating.

Tivoli Operating contends it was injured in issuing 50% of its capital stock for inadequate consideration and in paying out unwarranted management fees to Paramount Enterprises because of the coercion emanating from the conspiracy which forced it to pay such tribute in order to obtain a proper clearance of motion pictures for exhibition, thereby reducing its assets and income. This theory of

the case is entirely consistent with the decision in the *Fanchon* case, *supra*, upon which the Court of Appeals relies in holding to the contrary. As in effect stated by Judge Dimock (A. 41-42), the damages would be the difference between the value of the stock and the nominal amount paid. However, Judge Dimock held the stock received was not worth more than $1,000 because fair rent was paid under the lease according to Judge Leibell's prior decision (dismissing the Walwal Corporation course of action for lost rent from 1937 to 1947) and, therefore, the lease had no asset value upon which the capital stock value could be premised. Plaintiffs, however, claim that the asset value of the lease is a triable issue and that Judge Dimock and the Court of Appeals have completely ignored the further issue of injury and entitlement to a trial emanating from the forced payment of alleged unwarranted management fees by Tivoli Operating to avoid the consequences of the conspiracy. The only basis upon which the latter issue could be properly ignored would be to conclude that Tivoli Operating as a fifty-fifty creation of a co-conspirator and an independent theatre owner is precluded from proving injury under any circumstances. The Court of Appeals appears to take this position contrary to the position of Judge Dimock. The appellate court asserts that the Walwal Corporation is the aggrieved party rather than Tivoli Operating (A. 49). This overlooks the distinction between injury to Walwal as a landlord and separate injury to Tivoli Operating because of loss of assets and income emanating from the conspiracy. Although it is true that Walwal has an indirect interest as a stockholder of Tivoli Operating it cannot sue as a stockholder. In fact, a stockholder's action was dismissed in the case at bar on the ground that the corporate entity was the real party in interest (A. 48).

Also indicative of an arbitrary and capricious ignoring of controversial evidentiary issues which should have been allowed to be resolved at a trial by jury demanded by the plaintiffs is the affidavit of an expert, Sidney Lefcourt (A. 35), sworn to the 24th day of October, 1958, sub-

mitted to Judge Dimock on plaintiffs' motion to reargue, which opinions that based on earned profits, said 50% of the capital stock was worth $61,000 when issued to Paramount Enterprises in 1937 for $1,000. This affidavit is entirely uncontradicted except for a finding of Judge Leibell (A. 41) which has no pertinency in the light of the fact that earnings prove conclusively that the stock did have value which could only be attributable to a going business which The Walwal Corporation made available through its lease to Tivoli Operating, regardless of whether or not fair rent was paid under said lease. In fact, fair rent is not a figure that is unequivocal in amount. Dependent upon particular circumstances, it may be an amount in excess of minimum fair rent actually paid. This is demonstrated by the affidavit of Jules Pearlman (A. 39) sworn to the 24th day of October, 1958, and submitted in connection with plaintiffs' motion to reargue which states the maximum fair rent value also to be $36,121 (over an approximate period of 10 years) in excess of the contract rent paid (*i.e.*, 15% of gross receipts) which Judge Leibell held to be fair (premised upon his interpretation of the testimony of Charles Walder at his examination before trial). Judge Dimock's expressed theory that contract rent construed to be fair, precludes the lease under which it is paid from having asset value under all the circumstances, overlooks the fact that there are minimum and maximum limits of fair rent. If a minimum of fair rent is paid and that is what Judge Leibell's finding means, there would still be lease value beyond fair rent paid which even under Judge Dimock's theory could give capital value to the lease. Whether one accepts Judge Dimock's theory or not, however, the fact is that the lease had value as proved by the earned profits, so that one must reach the unequivocal conclusion that the lease from Walwal to Tivoli Operating was either consideration for capital stock as well as rent, or had a value in excess of the fair rent found by Judge Leibell to have been paid, as indicated by the Lefcourt and Pearlman affidavits[3] heretofore referred to.

---

[3] These affidavits were a part of the record on appeal before the Court of Appeals.

Conclusion

Aside from the important and novel question of law heretofore referred to with regard to the immunization of the defendants from suit by a corporation in which a co-conspirator has a joint 50-50 interest with an innocent stockholder (as found by the Court of Appeals) the foregoing demonstrates the need for the exercise of this Court's supervisory jurisdiction and justification for Judge Clark's apprehension of the court hostility toward antitrust suits as enunciated by Judge Clark to the following effect as in *Eagle Lion Studios, Inc., supra,* at page 451:

> "There seems to be a developing trend in some of our trial courts of hostility towards the 'big' antitrust cases and of discovering obstacles—going even back to matters of pleading and pretrial—in the way of a free showing of the need of remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, overworked court. But we are dealing with settled and cherished Congressional policy which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy. However serious the load, I do not believe our able trial judges desire to take any permanent course thus opposed to legislative purposes. But here, while doubtless not contemplated, the course of trial has had that consequence. I think, therefore, it requires and deserves a new start at the trial level."

A writ of certiorari should accordingly be granted.

Respectfully submitted,

CLAUDIA PEARLMAN,
Attorney for Petitioners,
c/o EDGAR A. BUTTLE,
36 West 44th Street,
New York 36, New York.

Of Counsel:
EDGAR A. BUTTLE,
Tower Building, Suite 207,
Washington, D. C.